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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE AND LOAN CORPORATION,
Appellant,

vs.

WACHOVIA BANK AND TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF APPELLANT.

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Counsel for Appellant.

KESTER WALTON,
Of Counsel.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF APPELLANT.

Reference to Report Below.

The opinion of the State Supreme Court (R. 35-41) is reported as "Richmond Mortgage and Loan Corporation v. Wachovia Bank & Trust Company and Alexandra G. Johnston, Executors of Robert P. Johnston, deceased," 210 N. C. (Advance Sheets), page 29. The same case is also reported in 185 S. E. Rep., 482.

No opinion was written in the General County Court of Buncombe County, where the case originated.

Statement of Jurisdiction.

In accordance with Rule XII, the appellant duly filed a statement showing the jurisdiction of this Court. Consideration of jurisdiction was postponed to the hearing of the case on the merits. Appellant submits here a summary statement of the jurisdiction of this Court, supplementing the statement heretofore filed.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937; U. S. Code, Ann. Title 28, Section 344.

The judgment of the Supreme Court of North Carolina is a final judgment in a suit under Article 4, Sections 2 and 8 of the Constitution of the State of North Carolina, and Sections 615, 658, 659, 1412 and 1413 of the North Carolina Code. *Chavis* v. *Brown*, 174 N. C. 122.

The Statute or Act passed by the Legislature of the State of North Carolina, the validity of which is drawn in question and which, it is contended, is, as applied in this case, unconstitutional and repugnant to Article 1, Section 10 of the Constitution of the United States, is Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, pages 402 and 403 and also shown in the North Carolina Code of 1935, Ann., Section 2593 (d).

The judgment sought to be reviewed was entered in the Supreme Court of the State of North Carolina on the 29th day of April, 1936 (R. 41). The petition for appeal (R. 42), the assignment of errors (R. 42) and the prayer for reversal (R. 44) were presented to the Chief Justice of the Supreme Court of North Carolina on the 10th day of July, 1936, and the order allowing said appeal (R. 44) was issued and the appeal bond approved by him on the said 10th day of July, 1936. The citation on appeal was signed by him on the 10th day of July, 1936.

The case was brought by appellant, a Virginia corporation, to recover judgment in the amount of Four Thousand Five Hundred Thirty-four and 79/100 Dollars ($4,534.79) with interest from June 19, 1933, the balance due on promissory notes executed by defendants. At the time defendants executed said promissory notes, they also executed a Deed of Trust to a Trustee, pledging as security for the payment of said promissory notes certain property located in the County of Buncombe, State of North Carolina, the said notes and Deed of Trust were dated and delivered on or about August 15, 1928 (R. 11). Upon default in the payment of the indebtedness, appellant caused the property pledged as security for said indebtedness to be sold under power of sale contained in the Deed of Trust, which sale was held on June 19th, 1933 (R. 12).

After crediting the amount received from said sale on the notes, executed by respondents, there remained due the sum sued for in this action which was instituted on June 18th, 1934 (R. 1). The defendants in the action set up the provisions of Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, and the question was submitted to a jury as to the fair worth of the property at the time and place of the sale, and the jury answered the verdict in the amount of Eight Thousand Dollars ($8,000.00) (R. 21), and on such verdict the court adjudged that plaintiff was entitled to recover nothing of the defendants (R. 28). It was admitted at the trial that the property was purchased directly or indirectly at the foreclosure sale by the appellant who was then the owner of the indebtedness (R. 14). Plaintiff in said action, the appellant herein, filed pleadings in said cause alleging that Section 3, Chapter 275, Public Laws of North Carolina, Session 1933, was repugnant to the provisions of Article I, Section 10 of the Constitution of the United States as applied to this appellant, because the notes sued on, together with the Deed of Trust

securing the same, were executed prior to the passage of said Act (R. 8). The appellant, during the entire trial of said action, and at each stage of the proceedings, preserved its exceptions as to the unconstitutionality of the Act in question and as applied in this case.

To sustain the jurisdiction of this Court, appellant contends:

First. The judgment appealed from is a final judgment of the Supreme Court of North Carolina, which is the highest court in the State having jurisdiction of the case. The case drew in question the validity, under the Federal Constitution, of the Statute of North Carolina providing for the right of a mortgagee to prove in a suit for a deficiency judgment the fair or reasonable value of said property as a defense and offset and thereby defeat the recover of such deficiency judgment against the maker of the notes, and mortgagee, either in whole or in part, and such statute was applied in this case although appellant's notes and Deed of Trust were executed prior to the passage of said Act, and the judgment of the State Court upheld the validity and application of the statute.

Second. That the Act in question impairs the obligation of a contract entered into prior to the time of its passage, and as construed in the instant case, is repugnant to the Federal Constitution.

Third. The Supreme Court of the State of North Carolina considered the question as to whether or not the statute was unconstitutional as applied to this appellant in the instant case.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Fiske v. *Kansas,* 274 U. S. 380, 385;

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 288;

Kansas City Southern Railway Co. v. *Road Improvement District,* 266 U. S. 379, 385;
Cohens v. *Virginia,* 6 Wheat. 264, 5 L. Ed. 257;
Home Building and Loan Association v. *Blaisdell,* 290 U. S. 398.

Statement of Case.

This is an appeal from a final judgment of the Supreme Court of the State of North Carolina, affirming the judgment of the Superior Court for Buncombe County, which court affirmed a judgment of the General County Court of Buncombe County, entered after a trial before the court and a jury.

On or about August 15, 1928, the respondents borrowed from the appellant the sum of Eight Thousand Dollars ($8,000.00), and as evidence of said indebtedness executed their promissory negotiable notes in the aggregate amount of Eight Thousand Dollars ($8,000.00) (R. 11). As security for said indebtedness, respondents also at the same time executed and delivered a Deed of Trust by the terms of which respondents pledged as security for said indebtedness a house and lot located in the City of Asheville, State of North Carolina (R. 11).

Thereafter, respondents defaulted in the payment of the indebtedness evidenced by said notes and secured by said Deed of Trust and appellant called on the Trustee in said Deed of Trust to foreclose the said property in accordance with the power of sale contained in said Deed of Trust, declaring the whole of said indebtedness due and payable in accordance with the terms of said notes and Deed of Trust (R. 12).

The said Trustee advertised said property in accordance with the terms of the Deed of Trust and the statutory law of the State of North Carolina and the property was sold on the 19th day of June, 1933 where and when the said

appellant directly or indirectly became the purchaser of said property for the price of Three Thousand Dollars ($3,000.00); and after the ten day period of redemption, the property was conveyed in accordance with the terms of the sale. (R. 12).

The net sum realized from the sale of said property was credited on the notes held by appellant and leaving a balance due appellant in the sum of Four Thousand Five Hundred Thirty-four and 79/100 Dollars ($4,534.79), together with interest thereon from the 19th day of June, 1933, until paid. (R. 13-21.)

Appellant, on June 18th, 1934, filed suit in the General County Court of Buncombe County (R. 1), to recover balance due on the notes.

The respondents (defendants below), in their pleadings, alleged, in substance, the provisions of Section 3, Chapter 275, Public Laws of North Carolina, Session 1933 (Statute is printed in margin),[1] and alleged that the property at the time and place of sale was fairly worth the amount of the debt secured by said Deed of Trust (R. 7, para-

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[1] Sec. 3 of Chap. 275, of the Laws of 1933:

"When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim,

graph 4 of Answer of defendants). The appellant (plaintiff below), in reply, alleged that said Act, to-wit: Section 3, Chapter 275, Public Laws of North Carolina, Session 1933, was unconstitutional and repugnant to the provisions of Article I, Section 10, of the Constitution of the United States because the notes sued on, together with the Deed of Trust securing the same, were executed prior to the passage of said Act (R. 8).

At the trial of the cause in the General County Court issues were submitted to the jury relative to the appellant becoming the purchaser of the property and the fair worth of the property at the time and place of sale, to which issues appellant objected and excepted (R. 21). Appellant also objected and excepted to the charge of the court on the question of the fair value of the property, and objected and excepted to the refusal of the Court to render judgment in favor of the appellant on the pleadings, and to the signing of the judgment as entered in the General County Court (R. 28-29). Appeal was taken from the General County Court of Buncombe County to the Superior Court of Buncombe County, the proper appeal court, and in the

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that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part; *Provided,* this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust, or other instrument; *Provided, further,* this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

Superior Court of Buncombe County, the assignments of errors from the General County Court were overruled and the judgment affirmed (R. 31), from which judgment of the Superior Court of Buncombe County appeal was taken to the Supreme Court of North Carolina, which court affirmed the judgment of the General County Court (R. 41).

There is no technical question of procedure. The sole question is whether the Act in question impaired the obligation of a contract entered into by and between appellant and respondents prior to the passage of said Act, and was, therefore, in violation of the Federal Constitution.

Specification of Errors.

1. The Supreme Court of the State of North Carolina erred in refusing to find Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, unconstitutional and repugnant to Article 1, Section 10, of the Constitution of the United States because, as construed and applied to this appellant, it results in impairing the obligation of a contract entered into by the respondents and which said contract is owned by the appellant and which said contract was entered into and executed prior to the passage of said above referred to Act.

2. The Supreme Court of North Carolina erred in holding Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, applicable in the above cause because, as construed and applied to this appellant, it resulted in depriving appellant of a judgment against the respondents to which it was entitled in accordance with the laws of the State of North Carolina at the time the contract which is the subject matter of the action was entered into.

3. The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court and in refusing to reverse said judgment upon the ground that the said Su-

perior Court erred in affirming the judgment of the General County Court denying to the appellant the right to have judgment rendered in its favor and on the pleadings as filed in said cause and at the close of all the evidence.

4. The Supreme Court of the State of North Carolina erred in rendering a final judgment or decree against the appellant upon the 29th day of April, 1936 in the above entitled cause.

Summary of Argument.

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I. The parties to the contract in question contracted with reference to the laws at that time in existence and such laws enter into and form part of the contract. This is true of the laws then in existence providing remedies to enforce performance of the contract 12

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398;

United States ex Rel. Louis A. Von Hoffman v. *City of Quincy*, 4 Wall. 535, 18 L. Ed. 403;

Sturges v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529;

Green v. *Biddle*, 8 Wheat. 1, 5 L. Ed. 547;

Bateman v. *Sterrett*, 201 N. C. 59;

Green v. *Asheville*, 199 N. C. 516;

Trust Company v. *Hudson*, 200 N. C. 688.

II. Under the law as it existed in North Carolina at the time the contract was entered into, beneficiary in a deed of trust had the right to foreclose by power of sale the property pledged as security, buy it in at the highest bid, credit the amount of the purchase price and recover a

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money judgment against makers for balance due without reference to value of the property foreclosed 13

Revised Statutes of North Carolina, Chapter XXXVII, Section 24, page 231;
Kornegay v. *Spicer*, 76 N. C. 95;
Shew v. *Kall*, 119 N. C. 450;
Flemming v. *Borden*, 127 N. C. 214;
Eubanks v. *Bectom*, 158 N. C. 230;
Hayes v. *Pace*, 162 N. C. 288;
Monroe v. *Fuchtler*, 121 N. C. 101;
Wilson v. *Vreeland*, 176 N. C. 504;
Phipps v. *Wyatt*, 199 N. C. 727;
First Carolina's Joint-Stock Land Bank v. *Stewart et al.*, 208 N. C. 139;
Insurance Company v. *Dey*, 206 N. C. 368;
Bank v. *Loughran*, 122 N. C. 668;
Rector v. *Lyda*, 180 N. C. 577;
Baber v. *Hanie*, 163 N. C. 588;
Dunlop v. *Smith et al.*, 196 N. C. 502.

III. The Act in question, passed after the execution of the contract, changed the law of North Carolina whereby the beneficiary in a deed of trust and after foreclosure under power of sale is required to accept the fair value of the property as payment on the indebtedness in lieu of recovery of money judgment 16

Re Crystal Ice and Fuel Company (D. C. Mont.), 283 Fed. 1007;
Richmond Mortgage and Loan Corporation v. *Bank*, 210 N. C. 29;
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Koonce v. *Fort*, 204 N. C. 426;

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Woltz v. *Deposit Company*, 206 N. C. 239;
Chadbourn v. *Johnston*, 119 N. C. 282;
Davis v. *Life Insurance Company*, 197 N. C. 617;
Chapter 275, *Public Laws of North Carolina, Session* 1933, *North Carolina Code*, *Section* 2593 (b), (c), (d), (e) and (f);
Haywood v. *Bank*, 207 N. C. 695.

IV. The passage of the law in question, while acting only on the remedy, impaired substantial contractual rights held by appellant under its contract, and therefore is unconstitutional as applied in this case 22

Sturges v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529;
McCracken v. *Hayward*, 2 Howard 608, 11 L. Ed. 397;
Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398;
Planters Bank v. *Sharp*, 6 Howard 301, 12 L. Ed. 447;
Haywood v. *Bank*, 207 N. C. 695;
W. B. Worthen Company v. *Kavanaugh*, 295 U. S. 56;
Antoni v. *Greenhow*, 107 U. S. 769, 27 L. Ed. 468;
Bronson v. *Kinzie*, 1 Howard 311, 11 L. Ed. 143;
Howard v. *Bugbee*, 24 Howard 461, 16 L. Ed. 753;
Walker v. *Whitehead*, 16 Wall. 314, 21 L. Ed. 357;

Edwards v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 793;

Barnitz v. *Beverly*, 163 U. S. 118, 41 L. Ed. 93;

Adams v. *Spillyards*, 86 A. L. R. 1493, 61 S. W. (2nd) 686;

Vanderbilt v. *Bruton Piano Company*, 89 A. L. R. 1080, 169 Atl. 177;

Langever v. *Miller*, 96 A. L. R. 836, 76 S. W. (2nd) 1025.

ARGUMENT.

Point I.

The parties to the contract in question contracted with reference to the laws at that time in existence and such laws enter into and form part of the contract. This is true of the laws then in existence providing remedies to enforce performance of the contract.

The above set forth principle of law is so firmly established in this Court that argument is unnecessary. Quoting from *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, at page 430:

> "The laws which subsist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

United States ex Rel. Louis A. Von Hoffman v. *City of Quincy*, 4 Wall, 535, 18 L. Ed. 403, 408;

Sturges v. *Crowninshield*, 4 Wheat, 122, 4 L. Ed. 529, 549;

Green v. *Biddle*, 8 Wheat. 1, 5 L. Ed. 547.

This is also true with regard to contracts and as construed by the Supreme Court of North Carolina. We quote from *Bateman* v. *Sterrett,* 201 N. C., 59, 61:

> "But it is also true that the laws in force at the time of the execution of a contract enter into and become a part of the convention of the parties."
>
> *Green* v. *Asheville,* 199 N. C. 516, 520;
>
> *Trust Company* v. *Hudson,* 200 N. C. 688, 690.

Point II.

Under the law as it existed in North Carolina at the time the contract was entered into, beneficiary in a deed of trust had the right to foreclose by power of sale the property pledged as security, buy it in at the highest bid, credit the amount of the purchase price and recover a money judgment against makers for balance due without reference to value of the property foreclosed.

Deeds of Trust and mortgages with power of sale originated in the State of North Carolina from the common law. We first find that the Deed of Trust, also the mortgage, was protected by the registration laws of the State of North Carolina and as shown in the Revised Statutes of North Carolina, Chapter XXXVII, Section 24, page 231, and which revised statutes went into effect on January 1st, 1838. The first discussion we find of foreclosure by power of sale is in the case of *Kornegay* v. *Spicer,* 76 N. C. 95. Quoting from this case, page 97:

> "A mortgage with a power of sale is a trust(ee), in the first place, to secure the payment of the debt secured by the mortgage, and, in the second place, for the mortgagor, as to the excess. The idea of allowing the mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to, after great hesitation, on the ground

> that, in a plain case, when the mortgage debt was agreed on and nothing was to be done except to sell the land, it would be a useless expense to force the parties to come into equity when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default."

Since the last above decision, such powers of sale have been recognized in the following cases:

Shew v. *Kall,* 119 N. C. 450, 453;
Flemming v. *Borden,* 127 N. C. 214, 217;
Eubanks v. *Bectom,* 158 N. C. 230.

Also, from time to time, and since the Revised Statutes of North Carolina, *supra,* went into effect, various statutory laws have been passed by our Legislature regulating and controlling the foreclosure of Deeds of Trust under powers of sale.

It is also the established law in the State of North Carolina that the beneficiary in a Deed of Trust made to a trustee and for the purpose of securing an indebtedness has the right to bid in the property at a sale held by such trustee. We quote from *Hayes* v. *Pace,* 162 N. C. 288, 292:

> "We do not controvert the proposition, supported by abundant authority, that the owner of a debt secured in a deed in trust made to a third party as trustee with power of sale, may lawfully bid and purchase at the sale, where there is no allegation or evidence of fraud or collusion between the creditor and the trustee."
>
> *Monroe* v. *Fuchtler,* 121 N. C. 101;
> *Wilson* v. *Vreeland,* 176 N. C. 504;
> *Phipps* v. *Wyatt,* 199 N. C. 727.

It has also been a well-established principle of law in the State of North Carolina, that, after foreclosure under power of sale in a Deed of Trust or mortgage, the holder

of the Deed of Trust or notes representing the indebtedness might recover a money judgment against the maker of the notes and Deed of Trust by suit in law and for the balance unpaid, after giving credit for the price for which the property was sold at such foreclosure sale.

In a late case, that of *First Carolina's Joint-Stock Land Bank* v. *Stewart et al.*, 208 N. C. 139 (1935), the Supreme Court of North Carolina held, in a cause of action almost identical to that alleged in the instant case, that defenses interposed by the defendants were immaterial and irrelevant and should be stricken out and upheld a judgment for deficiency after sale in a Deed of Trust. Quoting from this case, page 140:

> "It would seem from the allegations in their answer that the defendants were dealt with harshly by the plaintiff, but the court is without power to give them relief in this action. The plaintiff does not in this action invoke the equitable powers of the court. It is content to have only its legal remedy."

Of course, had the plaintiff gone into a court of equity asking for foreclosure of the property under a strict foreclosure it would have been subject to equitable defenses. Also, in the case of *Insurance Company* v. *Dey*, 206 N. C. 368, a cause of action almost identical to that alleged in the instant case was upheld and a demurrer filed to such action was overruled.

Quoting from *Bank* v. *Loughran*, 122 N. C. 668, 674:

> "And Bostick occupies the position of mortgagee of these lands as security for the payment of six notes, with a power to sell from the defendant; the notes not being paid, and Bostick as mortgagee selling under the power and applying the money on the debt as directed in the power; the money arising from the sale not being sufficient to pay the debt secured; can it be contended that the mortgagor, the defendant in this case, would not be liable to a personal judgment

for the balance of the debt? We can see no reason why he is not. So while this case upon the facts stated seems to be new, it is susceptible of solution upon well-established principles of law."

Quoting from *Rector* v. *Lyda*, 180 N. C. 577, 578:

"The doctrine of equity is that when the grantee in a deed assumes the payment of the mortgage debt he is to be regarded as the principal debtor, and the mortgagor occupies the position of a surety; and the mortgagee is permitted to resort to the grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises, and this by the equitable rule that the creditor is entitled to the benefit of all the collateral securities which his debtor has obtained to reinforce the principal obligation."

Baber v. *Hanie*, 163 N. C. 588;
Dunlop v. *Smith et al.*, 196 N. C. 502.

While we have no cases in North Carolina passing on the point, an investigation fails to show where, by any principle of law or decision in the State of North Carolina, prior to the passage of the Act in question, it could be urged that the fair value of the property foreclosed under a power of sale in a Deed of Trust could be pled and proven as an offset to defeat the rights of the mortgagee or beneficiary in a Deed of Trust to recover in an action for deficiency judgment.

POINT III.

The Act in question, passed after the execution of the contract, changed the law of North Carolina whereby the beneficiary in a deed of trust and after foreclosure under power of sale is required to accept the fair value of the property as payment on the indebtedness in lieu of recovery of money judgment.

In Point II, we discussed and showed the rights of a beneficiary in a Deed of Trust, prior to the passage of the Act in question. We will now discuss the rights and reme-

dies left to a beneficiary in a Deed of Trust after the passage of the Act, the validity of which is drawn in question.

Attention is called to the wording of the statute in question, and as follows:

> "It shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount paid was substantially less than its true value and upon such showing, to defeat or offset any deficienty judgment against him, either in whole or in part."

It will be noted that the words "fair worth" and "true value" are used. It is noted that the words "market value" or "salable value" are not used. The question then arises, what is "fair worth" or "true value"? We submit that it was the purpose of the Legislature in the passage of this law to attempt to give to the mortgagors credit for the value of the property, taking into consideration what it should be worth under ordinary circumstances where you have a person willing to sell and a purchaser willing to buy. In other words, it was the direct purpose of the passage of this Act, as gathered from the terms of it, to prevent the makers of mortgages from being held responsible for the depreciated value of the property, and which came about from the depressed market for real estate all over the country and particularly at the location of this property since the year 1930.

This was not the intention of the parties, or the contract of the parties, at the time it was entered into in the year 1928. Under the terms of the contract, the makers of the obligation agreed that if they defaulted in the payment, the property could be put up and sold after thirty days' notice, under the statutory law of the State of North Caro-

lina, to the highest bidder and, if necessary, that such highest bidder be the beneficiary in the Deed of Trust, and that thereafter they would be personally liable for any balance due. The Legislature came to their assistance by virtue of the terms of this Act and changed that agreement by saying, irrespective of what anyone is willing to pay for the property at such foreclosure sale, you will be entitled to receive credit for what the property should be worth under normal circumstances, and this without regard to the economic conditions prevailing at the time of the sale.

As was stated *in re Crystal Ice and Fuel Company* (D. C. Mont.), 283 Fed. 1007, 1009:

> "Salable value and fair valuation are not synonymous."

In other words, the direct result of the passage of the Act in question and the force and effect of the judgment rendered in this cause was that the appellant was forced to accept a valuation of the property, not what it could be sold for at that date, in lieu of money as payment of the indebtedness which it held.

But the point is raised in the opinion of the Supreme Court of North Carolina, 210 N. C. 29, page 34:

> "Nor does the statute hinder, delay or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction."

It will, therefore, be necessary to discuss what the rights of the beneficiary in the Deed of Trust would be in a "court of competent jurisdiction."

It has always been held, under the common law of the State of North Carolina, that an equity court had jurisdiction over the foreclosure of indebtednesses secured by

mortgages or Deeds of Trust. However, in such court of equity, the Court is not bound by the terms of the contract existing between the parties, particularly with reference to the foreclosure and the procedure looking to that end. Quoting from *Jones* v. *Williams*, 155 N. C. 179, page 191:

> "Its (the Court's) power to foreclose is not derived from the power of sale in the mortgage. It could decree foreclosure if the instrument contained no such power. The court acts under its general equity jurisdiction and proceeds to grant relief irrespective of the stipulations contained in the power of sale. It pursues its own course and practice without any restraint by reason of the power of sale contained in the Deed, so as to administer the rights of the parties according to law and its own equitable procedure, acting under its own powers and jurisdiction and not by virtue of any contractual power given in the mortgage or deed of trust."

Quoting from *Koonce* v. *Fort*, 204 N. C. 426, 430:

> "There is nothing in the statute which deprives the court of its power to prescribe the terms upon which land or other property shall be sold under its orders, judgments or decrees."

Quoting from *Woltz* v. *Deposit Company*, 206 N. C. 239, 241:

> "When a sale has been made under a judgment or decree of a court of competent jurisdiction, the sale must ordinarily be reported to and confirmed by the court, before it can be consummated by a conveyance of the property. In that case, the sale will not be confirmed, and a conveyance of the property ordered, unless it is made to appear to the court that the sale was fairly conducted, and the amount bid for the property its reasonable value."

It will be seen from the above referred to leading cases on this subject that the foreclosure of a Deed of Trust in

an Equity Court is an entirely different procedure from that of the foreclosure by a trustee under the power of sale. It is an equitable proceedings and subject to all equitable defenses. It hinders and delays the beneficiary from the prompt compliance under the terms of the Deed of Trust. The sale may be made upon any conditions that the court sees fit to prescribe. The confirmation of the sale as to price is within the equitable discretion of the court. Also, the granting of the recovery for any balance due is within the equitable discretion of the court. The contract entered into by and between the parties is not interpreted as written, but is interpreted according to equitable principles. While we do not condemn the use of these equitable powers, or for one minute question the wisdom of their protection to mortgagors, at the same time the parties entered into a contract where, by the laws as they then existed, the beneficiary had the right to enforce its contract without subjecting itself to this course of procedure.

It is also true that in strict foreclosure in a Court of Equity in the State of North Carolina it is necessary to bring in all junior lienors, devisees of a deceased mortgagor and any other persons claiming any interest in the title to the property involved in order to secure a clear title from the Court. *Chadbourn* v. *Johnston,* 119 N. C. 282; *Davis* v. *Life Insurance Company,* 197 N. C. 617.

The respondents contend that appellant has been deprived of no remedy because, while it is true that prior to the Act of 1933, appellant could have foreclosed under the power of sale and obtained a deficiency judgment, yet the respondents always had the right to go into a Court of Equity, secure a restraining order and have the property foreclosed under the direction and decree of an Equity Court and accordingly appellant has not been damaged by the Act of 1933.

But, appellant was deprived of a remedy by the Act of 1933, because, under that Act it could have sold under the power of sale and obtained a deficiency judgment, and as the only complaint respondents make is that the property did not bring a fair price, they could have only enjoined the sale and thrown the foreclosure into an Equity Court on that ground, and on that ground an Equity Court would not have taken jurisdiction.

This point has been directly decided by the Supreme Court of North Carolina in a late case, that of *Haywood* v. *Bank* (1935), 207 N. C. 695. In this action, plaintiffs secured an equitable restraining order restraining the foreclosure of a deed of trust. Among the grounds alleged was that the deed of trust was foreclosed at such time as the property would not bring its full and fair market value, and was therefore detrimental to all interested parties. The Court, in speaking of this allegation, said the following:

> "There is left only the allegation that if the deed of trust was foreclosed at this time the property would not bring its full and fair market value, and neither the legislation growing out of present financial emergency nor the decisions of this Court authorize or sustain injunctive relief for the reason that the time is not auspicious for a sale. To so hold would practically nullify the system of securing indebtedness by mortgages and deeds of trust on land now, and for many years past, in general and accepted use.
>
> "It appears from the record that the note secured by the deed of trust is past due and unpaid, that those who hold the equity of redemption have ratified and confirmed the execution of the said note and deed of trust, and that demand for payment has been made, and that there is no allegation of fraud, restraint, oppression, or usury in the transaction, or of insolvency of the *cestui que trust* or trustee.

"We are constrained to hold, on the record, that the restraining order should be dissolved, and it is so ordered.

From the above we think it clearly established by the law of North Carolina that an equity court, in so far as restraining the sale of property under a power of sale by the trustee, has no authority to grant any relief on the ground of fair value of the property, or the price bid at said sale. Therefore, appellant contends that, prior to the passage of the Act of 1933, it had a substantial contract right to proceed by power of sale and deficiency without any interference of a Court of Equity on the only grounds contended for by the respondents in this cause.

POINT IV.

The passage of the law in question, while acting only on the remedy, impaired substantial contractual rights held by appellant under its contract, and therefore is unconstitutional as applied in this case.

We do not think that it can be contended that there was not a change or alteration in the remedy whereby the contract in question might be enforced. No doubt, however, it will be contended that the change of remedy was such change and alteration as was within the right of the State Legislature to control.

The appellant insists, however, that the obligations of its contract were impaired in that the impairment was predicated on a law which annulled, abolished and abrogated a very substantial contractual right which it held under the contract. This substantial right was to sue for deficiency, after foreclosure by power of sale, without accounting for the "fair worth" of the property so foreclosed.

The change in the remedy produced by the passage of the Act released a part of the obligation which bound the

makers of the deed of trust and note. Quoting from *Sturges* v. *Crowinshield*, 4 Wheat. 122, 4 L. Ed. 529, 549:

> "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it."

The passage of the Act in question diminished the duty which the obligors owed under the contract, and furthermore obstructed the rights accruing to the obligee. Quoting from *McCracken* v. *Hayward*, 2 Howard 608, 11 L. Ed., 397, 399:

> "There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

It is not thought necessary to cite or quote all the cases decided by this Court touching upon this all-important question of what impairs the obligation of a contract, but we believe the gist of these decisions may be well summed

up in the few words contained in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 431:

> "The obligations of a contract are impaired by law which renders them invalid or releases or extinguishes them—and, impairment, as above noted, has been predicated of laws which, without destroying contracts, derogate from substantial contractual rights."

As was stated in *Planters Bank* v. *Sharp*, 6 Howard 301, 327, 12 L. Ed. 447, 458:

> "One of the tests that a contract has been impaired is, that its value has by legislation been decreased. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

The appellant is willing to test the impairment of its contract by the passage of the law in question by the above rule, and let us consider the value of this contract before and after the passage of the Act. Before the passage of the Act, the holder of the notes and a deed of trust had the right to demand payment upon default and to have the property immediately advertised for foreclosure by the trustee, and at the sale of said property to bid it in at the highest bid, take the property for whatever it might bring at the sale and thereafter sue for and recover a money judgment for the balance due. This completed one of the means of enforcement. It was expeditious, complete and economical. There were no means, prior to the Act of 1933, by which the carrying out of this procedure could be delayed or hindered by the maker of a note and obligor on the grounds that the property would not bring its fair value, because a Court of Equity, upon application for a restraining order to prevent the sale or to prevent confirmation of the sale,

would not take jurisdiction on this ground. *Haywood* v. *Bank*, 207 N. C. 695.

What were the rights of the appellant after the passage of the Act? It could still foreclose under the power of sale, bid in the property and either stop there or proceed to recover a deficiency judgment. However, it was then met with a jury verdict as to the fair value of the property, and whatever amount might be adjudicated as a fair value must be credited on the notes instead of payment in money. If appellant did not elect to take its chances as to what the property would bring at the sale under the power and as to what a jury verdict might be as to the amount it would credit on the notes as fair value of the property, it could then go into a Court of Equity and ask for foreclosure under the equitable powers of the Court. In this proceedings, the terms of the contract with regard to the sale of the property, the terms of the sale, the time of the sale, the reasonableness of the bid made for the property, which would in turn mean the reasonableness of the amount which it would collect as deficiency would all be within the equitable discretion of the Court. It would also be forced to bring in all parties who might have an interest in the land sought to be foreclosed. To complete its possession of the property under such procedure, was fraught with various obstacles, delay, hindrances and what influence the economic conditions might have in the conscience of the Court.

Let us assume further that from the years 1928 to 1934 there had been a great depreciation in property values, and, as illustrated by the record in this case, property on which Eight Thousand Dollars ($8000.00) was loaned in 1928 was sold in 1933 after due advertisement at public sale, and the last and highest bid thereon was Three Thousand Dollars ($3000.00), and that, therefore, it was apparent that the property did not have a salable value comparable to the

amount of indebtedness at the time of default. Would any investor, business man or other person consider a contract as valuable after the passage of the Act in question as he would have considered it prior thereto? In reality, after the passage of the Act, any purchaser of the contract would be buying a lawsuit with very little chance of complete recovery and he would have every reason to believe that he was going to take a loss on the face value of such contract. We believe a statement contained in *W. B. Worthen Company* v. *Kavanagh*, 295 U. S. 56, 62, quoted as follows:

> "What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed, they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

is very pertinent to the instant case.

Let us view the matter from the standpoint of the obligors in said contract. Under the law as it existed at the time of the execution of this contract, the obligors were spurred by every motive of self-interest to pay their obligation, otherwise they knew the property might be foreclosed promptly and they would be liable for the difference between what the property brought at public sale and the amount of the debt. They also knew that they could not prevent such action on the sole ground that the property would not bring its fair value at the time of such sale. (207 N. C. 695.) Therefore, it behooved them to make every effort to keep the obligation in good standing and to prevent such foreclosure. After the passage of the Act, the obligors felt secure in permitting a default to occur. If sued for a money judgment without foreclosing the

property, they had the benefit of the security until such time as it might be fairly worth the indebtedness against it. If sued in a Court of Equity for foreclosure under the powers of the Court, they knew that they could delay any positive action for an indeterminable period and contest over the reasonable value of the property; that further, if the beneficiary foreclosed by power of sale, they would be in still better circumstances by getting credit, not for what the property would sell for at such foreclosure sale but what it was fairly worth.

Was not the position of the obligors, the respondents in this case, greatly changed, all to their advantage, and was not this the real intention of the Legislature in the passage of this Act? If they did obtain an advantage under the contract by the passage of the law in question and to the derogation of a substantial right of the appellant, then can it be said that the contract was not devalued, its efficacy lessened and its force depleted?

It has been said throughout the various lines of authority bearing on this subject that every case must be determined upon its own circumstances. Quoting from *Antoni v. Greenhow,* 107 U. S. 769, 775; 27 L. Ed. 468, 471:

> "It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution and, to that extent, void."

Taking into consideration the points discussed heretofore as to the rights of the appellant prior to the passage

of the Act in question, and the rights left to him after the passage of the Act, it is contended that this case falls within that class of cases heretofore decided by this Court as being within the prohibition, a few of which are referred to as follows:

In *Bronson* v. *Kinzie*, 1 Howard, 311, 316, 11 L. Ed. 143, 145, a mortgage was executed in Illinois containing a power of sale. Subsequently an Act of the Legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of a contract and was, therefore, void.

In *McCracken* v. *Hayward*, 2 Howard 608, 11 L. Ed. 397, 399, a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void for the reason that it impaired the obligation of the contract.

In *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, 549, it was held that a State insolvent or bankrupt law was inoperative as to contracts which existed prior to its passage.

In *Howard* v. *Bugbee*, 24 Howard 461, 16 L. Ed. 753, it was held that an act passed by a State after the execution of a mortgage was inoperative and void as impairing the obligation of a contract where it was attempted to give an extension of two years after the sale under the mortgage in which the mortgagor might redeem the land.

In *Walker* v. *Whitehead*, 16 Wall. 314, 21 L. Ed. 357, this Court held unconstitutional a Georgia statute requiring the plaintiff, suing on a contract, to prove as a condition precedent to recovery in his favor that all legal taxes

chargeable by law thereon had been paid since the making of the contract, and that such act was an impairment of the obligation of a contract.

In *Edwards* v. *Kearzey,* 96 U. S. 595, 24 L. Ed. 793, 796, this Court held that an act of the State of North Carolina increasing the exemption to which a debtor was entitled was unconstitutional and invalid as applied to a pre-existing debt. Quoting from this decision:

> "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations', as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable."

In *Barnitz* v. *Beverly,* 163 U. S. 118, 127, 41 L. Ed. 93, 100, this Court held a law of Kansas invalid as applied to a sale under a mortgage executed before its passage whereby the period of redemption from sale under a mortgage was extended for a period of eighteen months. Quoting from this case:

> "At all events the decisions of this Court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States."

In *W. B. Worthen Company* v. *Kavanaugh,* 295 U. S. 56, this Court held that a law of the State of Arkansas extending the time for various steps in a proceeding to enforce

payment of an assessment and other restrictions, was invalid and unconstitutional as impairing the obligation of a contract theretofore entered into.

The case of *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398, may be distinguished in that this case was decided on the grounds of an emergency, but in that case we quote the following, page 445:

> "As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained."

It has been found that in at least seventeen States various laws have been passed within the past few years attempting to limit, regulate or cut off rights of the mortgagees to deficiency judgments. Several of these cases have been ruled on by their respective Supreme Courts. In the case of *Adams* v. *Spillyards,* 86 A. L. R. 1493, 61 S. W. (2nd) 686, the Supreme Court of the State of Arkansas held that such act was unconstitutional, and quoting from that case, page 1497:

> "This, too, in the face of the fact that the loan was made more on the moral risk than on the real estate security in the one case, and more on the personalty securing the loan than the real estate in the other. The undisputed effect of Sections 1 and 2 of the Act is to prohibit deficiency judgments in mortgage foreclosures in Chancery Courts, a legal possible right inherent in all existing Arkansas mortgages at the effective date of the Act, which was a part of the mortgage contracts themselves. This personal liability was a part of the contract because authorized by law at the time of execution and in the place of performance. The principal

object of Act No. 57 was to take away from the mortgagee that right, and of necessity violates the obligations of all existing mortgage contracts."

Also in the case of *Vanderbilt* v. *Bruton Piano Company*, 89 A. L. R. 1080, 169 Atl. 177, the Supreme Court of New Jersey ruled on a similar Act and quoting from this case, page 1084:

"The statutory setting up of fair market value, standing stark and alone, as a self-sufficient, resistless fact in reduction of an otherwise collectible debt is such a restriction and limitation upon the mortgagee's right of recovery as to be an impairment of a pre-existing contract, and therefore, and to that extent, in conflict with Article 1, Section 10, of the Constitution of the United States."

In the case of *Langever* v. *Miller*, 96 A. L. R. 836, 76 S. W. (2nd) 1025, the Supreme Court of the State of Texas held that an Act similar and almost identical to that in the instant case was unconstitutional.

It is to be borne in mind that the Act in question, which is Section 3, Chapter 275, Public Laws of North Carolina, Session 1933, is not predicated upon any emergency, or is not concerned with any relief to a debtor during the depression. It is not temporary in its nature, it is final, complete and permanent. It is not restrictive to properties occupied by the mortgagor. The law is equally applicable to properties both for speculative purposes, for investment or otherwise.

Appellant respectfully submits that within the strength of the decisions of this Court, as set forth in the following passage, it is entitled to have its contract upheld without the interference of the passage of the Act of 1933. Quoting

from *Edwards* v. *Kearzey*, 96 U. S. 595, 611, 24 L. Ed. 793, 797:

> " 'Policy and humanity' are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it."

POINT V.

The judgment should be reversed.

Respectfully submitted,

JOHN Y. JORDAN, JR.,
Counsel for Appellant.

KESTER WALTON,
Of Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE AND LOAN CORPORATION,
Appellant,

vs.

WACHOVIA BANK & TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

R. R. WILLIAMS,
S. G. BERNARD,
Counsel for Appellant.

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Appellees.

STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT.

The appellees respectfully present the following matters and grounds making against the jurisdiction of the Court to entertain this appeal:

1.

It is respectfully submitted that no substantial Federal question arises upon this appeal for that the statute enacted by the Legislature of the State of North Carolina at its legislative session of 1933, being Section 3 of Chapter 275 of the Public Laws of North Carolina for the Year 1933, at pages 402 and 403, is as follows:

> "SEC. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or